# APPENDIX

## I. Judicial and Administrative Opinions

### A. Opinion Below

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UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 82-1132

JOETTE LORION, d/b/a CENTER FOR NUCLEAR RESPONSIBILITY
*Petitioner,*

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION AND UNITED STATES OF AMERICA,
*Respondents,*

FLORIDA POWER & LIGHT COMPANY,
*Intervenor.*

Argued Nov. 18, 1982

Decided July 26, 1983

Petition for Review of an Order of the Nuclear Regulatory Commission

Martin H. Hodder, Miami, Fla., for petitioner.

Richard P. Levi, Atty., U.S. Nuclear Regulatory Com'n, Washington, D.C., with whom Leonard Bickwit, Jr., Gen. Counsel, E. Leo Slaggie, Acting Sol., U.S. Nuclear Regulatory Com'n, Peter R. Steenland, Jr., and Martin Green, Attys., Dept. of Justice, Washington, D.C., were on the brief, for respondents. James A. Fitzgerald, Atty., U.S. Nuclear Regulatory Com'n, and Dirk D. Snel, Atty., Dept. of Justice, Washington, D.C., also entered appearances for respondents.

Harold F. Reis and Steven P. Frantz, Washington, D.C., were on the brief, for intervenor. Norman A. Coll, Miami, Fla., also entered an appearance for intervenor.

Before MIKVA, Circuit Judge, MACKINNON, Senior Circuit Judge, and SWYGERT,* Senior Circuit Judge, United States Court of Appeals for the Seventh Circuit.

Opinion for the Court filed by Circuit Judge MIKVA.

MIKVA, Circuit Judge:

This case requires us to measure this court's authority to review directly an agency's refusal to institute regulatory proceedings. Joette Lorion, the petitioner, seeks review of a final decision of the Nuclear Regulatory Commission (NRC or Commission) denying her request that the Commission institute licensing review of Turkey Point Plant Unit Number 4 (Turkey Point), a nuclear reactor located near Miami, Florida. The jurisdictional bases of the petition for review are asserted to be 28 U.S.C. § 2342(4) (1976) and 42 U.S.C. § 2239(b) (1976) which together give this court authority to review directly those final orders of the NRC entered after formal agency proceedings. Because the Commission's decision in this case did not result from such a formal proceeding, however, we must dismiss this case for lack of subject matter jurisdiction.

## BACKGROUND

In September 1981, the petitioner wrote the Commission to express her concern that the continued operation of the Turkey Point reactor near her home threatened her safety and the safety of her neighbors. Specifically, the petitioner's letter called attention to the possible leakage of Turkey Point's steam generator tubes and questioned the integrity of the reactor's steel pressure vessel. To address these concerns, the petitioner requested in her letter that the Commission (1) temporarily shut down the reactor for a steam generator inspection and (2) initiate a license review to consider the suspension of Turkey Point's operating license until such time as its

* Sitting by designation pursuant to 28 U.S.C. § 294(d).



operator, Florida Power and Light Company (FP & L), submitted proof of the reactor's safety.

The Commission treated the petitioner's letter as a specific enforcement request under section 2.206 of its rules of practice, 10 C.F.R. § 2.206 (1982), and referred the request to the NRC's Director of Nuclear Reactor Regulation. Section 2.206 provides a means by which any member of the public may request the Director of Regution to take enforcement action against a NRC licensee. Seven weeks later, however, the Director notified the petitioner that he was denying her request. Among the reasons given were that an inspection of Turkey Point's steam generator tubes had taken place since petitioner had sent her letter (thereby mooting that aspect of her request) and that the ongoing monitoring of the reactor's steam generator tubes and an upcoming study of the reactor's pressure vessel integrity were sufficient to protect the public's health and safety.

After unsuccessfully urging the Commission to review the Director's decision, the petitioner filed for review in this court. She asks that we set aside the Director's decision as arbitrary and capricious agency action that, in addition, was reached without affording her the benefit of a public hearing; alternatively, the petitioner contends that her letter was merely "advisory" and was not intended as a section 2.206 request. Moreover, the petitioner asserts in her brief that the Commission has failed to prepare an adequate environmental impact statement, as required by the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4361 (1976 & Supp. IV 1980), for repairs made to Turkey Point's steam generators.

## DISCUSSION

At the outset, it is important to note that our review is limited to the Commission's denial of the petitioner's request under section 2.206 of the NRC's rules of practice.

Accordingly, none of the petitioner's NEPA arguments are properly before us. These arguments were not raised by the petitioner in her letter of September 1981 and therefore played no role whatsoever in the agency action that the petitioner asks us to review. *See* Letter from Joette Lorion to the NRC (Sept. 11, 1981), Joint Appendix (JA) 1-2. This court long has recognized that our normal procedures allow only those contentions subjected to agency scrutiny during the administrative process to be entertained on judicial review. *See D.C. Transit System, Inc. v. Washington Area Transit Commission*, 466 F.2d 394, 413-14 (D.C.Cir.), *cert. denied*, 409 U.S. 1086, 93 S.Ct. 688, 34 L.Ed.2d 673 (1972). We also reject the petitioner's contention that her letter should not have been treated as a section 2.206 request because she had not formally labelled or addressed her letter as a "section 2.206 request" and had intended it to be merely "advisory." In promulgating its rules of practice, the Commission clearly expressed its intent to treat "any" request for the modification, suspension, or revocation of a license as a section 2.206 request, *see* 39 Fed. Reg. 12,353 (1974), and the court may rely upon this contemporaneous explanation of the scope of the agency's rules, *see Environmental Defense Fund, Inc. v. EPA*, 636 F.2d 1267, 1280 (D.C.Cir. 1980). Indeed, it would be a disservice to members of the interested public for the NRC to reject out of hand enforcement requests simply because they were not appropriately labelled and addressed. Thus, properly framed, the petition for review asks us to consider the Commission's treatment of the petitioner's September 1981 letter under 10 C.F.R. § 2.206.

Although the parties have not raised the issue, we nevertheless must determine our jurisdiction to review NRC denials of section 2.206 requests. It is axiomatic that federal courts of appeals are courts of limited jurisdiction "empowered to hear only those cases . . . entrusted to them by a jurisdictional grant by the Congress." 13



C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3522, at 44 (1975 ed.). Our jurisdiction to review administrative decisions of the NRC is straightforward. Under 28 U.S.C. § 2342(4) (1976), courts of appeals have authority to review "all final orders of the Atomic Energy Commission [now the NRC] made reviewable by section 2239 of title 42." Section 2239 of title 42 provides, in subsection (b), for judicial review in the court of appeals of "[a]ny final order entered in any proceeding of the kind specified in subsection (a)." 42 U.S.C. § 2239(b). Section 2239 designates, in subsection (a), those formal NRC "proceedings" in which a person may, upon request, demand a hearing. These proceedings include "any proceeding . . . for the granting, suspending, revoking, or amending of any license or construction permit . . . ." 42 U.S.C. § 2239(a). Thus, we may review the Commission's final order in this case, denying petitioner's request under 10 C.F.R. § 2.206, only if the order was entered in the kind of "proceeding" specified in 42 U.S.C. § 2239(a).

A. *The Nature of the Section 2.206 Process*

To appraise properly the relationship of section 2.206 requests to NRC "proceedings," it is helpful to describe briefly the regulatory framework into which section 2.206 fits. Under section 2.202 of the NRC's rules of practice, the Commission's various staff directors may "institute a proceeding to modify, suspend, or revoke a license . . . by serving on the licensee an order to show cause. . . ." 10 C.F.R. § 2.202(a) (1982). A show cause proceeding under section 2.202 constitutes a formal "proceeding" under 42 U.S.C. § 2239(a) and, upon timely demand, the Commission must grant the licensee a hearing. *See* 10 C.F.R. § 2.202(b)-(c). In 1974, the Commission adopted section 2.206 specifically to provide a mechanism for members of the public to request the Director of Regulation to institute a section 2.202 proceeding:

> Any person may file a request for the Director of Regulation to institute a proceeding pursuant to § 2.202 to modify, suspend, or revoke a license or for such other action as may be proper. . . . The requests shall specify the action requested and set forth the facts that constitute the basis for the request.

10 C.F.R. § 2.206(a) (1982); *see* 39 Fed. Reg. 12,353 (1974).

Although the Commisison has interpreted section 2.206 to require issuance of a show cause order when "substantial health or safety issues have been raised," *Consolidated Edison Co.*, 2 N.R.C. 173, 176 (1975), the Commission has never required that this determination be made pursuant to a hearing, *see, e.g., Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear-1), 7 N.R.C. 429, 432-33 (1978). Instead, the Director of Regulation has considerable discretion to make whatever unilateral inquiries he or she deems necessary. Provided that this discretion is not abused, the Director "is free to rely on a variety of sources of information, including staff analysis of generic issues, documents issued by other agencies, and the comments of the licensee on the factual allegations." *Id.* The language of section 2.206 merely requires that

> Within a reasonable time after a request pursuant to paragraph (a) of this section has been received, the Director of Regulation shall either institute the requested proceeding . . . or shall advise the person who made the request that no proceeding will be instituted in whole or in part . . . and the reasons therefor.

10 C.F.R. § 2.206(b) (1982). In short, a section 2.206 request triggers a preliminary investigation by the NRC's staff to determine whether or not a formal proceeding should be instituted.



In light of the language and function of section 2.206, both this court and the Seventh Circuit have affirmed the Commission's refusal to hold hearings on section 2.206 requests; the Commission's processing of such requests repeatedly has been held *not* to constitute a "proceeding" under 42 U.S.C. § 2239(a). In *Illinois v. Nuclear Regulatory Commission*, 591 F.2d 12 (7th Cir. 1979), for example, the court held that hearings on section 2.206 requests were properly denied because the requests did not involve "agency action which, according to that agency's governing statute, must be preceded by a hearing." *Id.* at 14. Similarly, in *Porter County Chapter of the Izaak Walton League v. Nuclear Regulatory Commission (Porter County)*, 606 F.2d 1363 (D.C.Cir.1979), this court held that the procedural accoutrements of a statutory "proceeding" were inapplicable to section 2.206 requests because "[t]he agency is not bound to launch full-blown proceedings simply because a violation of the statute is claimed. It may properly undertake preliminary inquiries in order to determine whether the claim is substantial enough under the statute to warrant full proceedings." *Id.* at 1369 & n. 16 (noting that the result is "congruent with that . . . in *Illinois v. NRC*") Relying on both of these decisions, the Commisison maintains in the present case that the petitioner was not entitled to a hearing on her section 2.206 request. As the Commission succinctly puts it: "A request for an enforcement proceeding is just that—a request. Unless and until granted, it is not a 'proceeding' where the requester has any right to present evidence." Government Brief at 24-25.

B. *Caselaw Regarding Subject Matter Jurisdiction*

Neither the *Porter County* nor *Illinois v. NRC* court discussed the issue of subject matter jurisdiction. Yet, given this court's holding in *Porter County* that section 2.206 requests do not entail "proceedings" under 42 U.S.C. § 2239(a), it would logically follow that we must dis-

miss petitions to review such requests for lack of jurisdiction: 42 U.S.C. § 2239(b) expressly limits our reviewing authority to final orders entered pursuant to the kind of "proceedings" specified in 42 U.S.C. § 2239(a). The logic of the jurisdictional statute, however, has been conveniently distorted in a separate line of authority.

In *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission (NRDC v. NRC)*, 606 F.2d 1261 (D.C.Cir.1979), this court held that it had exclusive jurisdiction to review a NRC decision denying a request by the Natural Resources Defense Council (NRDC) for the Commission to license certain tanks constructed for the storage of high-level radioactive waste. The Commission had denied the NRDC's request because the NRC's licensing jurisdiction extends only to storage tanks authorized for long-term storage, *see* 42 U.S.C. § 5842(4) (1976), and the tanks in question were intended only for short-term storage, *see* 606 F.2d at 1264. Stating that "a licensing jurisdiction determination is a necessary first step in any proceeding for the granting of a license," this court found that the NRC's decision "was 'entered in a proceeding' for 'the granting . . . of any license' " under 42 U.S.C. § 2239(a) and thus within the reviewing jurisdiction of this court under 42 U.S.C. § 2239(b).

Our decision in *NRDC v. NRC* was scrutinized recently by the Seventh Circuit in *Rockford League of Women Voters v. Nuclear Regulatory Commission (Rockford)*, 679 F.2d 1218 (7th Cir.1982). At issue in *Rockford* was the Commission's denial of a section 2.206 request that the Commission institute proceedings to revoke the construction permit of a partially completed reactor because of allegedly unresolved safety issues. Although Judge Posner, writing for the *Rockford* court, upheld the Commission's decision, he correctly noted the jurisdictional implications of *Porter County* and *Illinois v. NRC:* "At least on a literal reading of section 2239(b), the Director's action in denying the petitioner's request to initi-



ate a revocation proceeding was not an order, final or otherwise, in a section 2239 proceeding; it was a refusal to initiate such a proceeding. . . ." *Id.* at 1220. Moreover, Judge Posner added:

> A ruling that the courts of appeals lack jurisdiction to review the Director's refusal to initiate a revocation proceeding would not leave the petitioner remediless. The League could still bring suit in district court under 28 U.S.C. § 1331, the general federal-question jurisdiction statute, see *Izaak Walton League of America v. Schlesinger*, 337 F.Supp. 287, 291-92 (D.D.C.1971); *Gage v. Commonwealth Edison Co.*, 356 F.Supp. 80, 84 (N.D.Ill.1972); *Gage v. AEC*, *supra*, 479 F.2d [1214] at 1222, and perhaps under other statutes, such as 28 U.S.C. § 1337 (acts regulating commerce), as well. The district court is arguably the more appropriate venue for a proceeding to review informal agency action, of which agency inaction is a conspicuous example. In deciding not to initiate a proceeding to revoke the Byron construction permit, the Director of Nuclear Reactor Regulation naturally did not compile the kind of formal record that is the usual predicate for reviewing agency action in the courts of appeals. To decide whether he abused his discretion it might be necessary to reconstruct the informal record on which he based his decision. The district courts are better suited to perform that task than the courts of appeals See *Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor*, 619 F.2d 231, 241 (3d Cir.1980).

*Id.* at 1220-21. Despite these misgivings, the *Rockford* court concluded "primarily on the authority of [*NRDC v. NRC*]" that district courts were precluded from asserting jurisdiction to review the NRC's section 2.206 decisions because of the exclusive jurisdiction over licensing "proceedings" lodged in the courts of appeals. *Id.* at 1221.

Although Judge Posner noted that the holding in *NRDC v. NRC* "admittedly does some violence to the language of 42 U.S.C. § 2239(b)," and suggested that he might be "somewhat inclined as an original matter to come out the other way," he interpreted "proceeding" in section 2239(b) to encompass the informal section 2.206 process in order to avoid creating a conflict between the circuits and because he felt that an extra level of district court review would be simply "too much." 679 F.2d at 1221.

Shortly after *Rockford* was decided, this court again addressed its jurisdiction to review the NRC's section 2.206 decisions in *Seacoast Anti-Pollution League of New Hampshire v. Nuclear Regulatory Commission* (*Seacoast*), 690 F.2d 1025 (D.C. Cir. 1982). At issue in *Seacoast* was a section 2.206 request that the Commission institute a proceeding to revoke the construction permits for a non-operational reactor because the permits did not include an adequate evacuation plan. In sustaining the Commission's denial of this request, we acknowledged that this court has jurisdiction "only if the Commission's final order was entered in a proceeding for the revoking of the construction permits." 690 F.2d at 1028. After reciting the statutory requirement, however, we referred to *NRDC v. NRC* and *Rockford* and concluded that the Commission's refusal to institute a section 2239(a) revocation proceeding was nonetheless a "necessary first step" in any revocation proceeding and hence reviewable under 42 U.S.C. § 2239(b). 690 F.2d at 1028.

C. *Resolving the Conflict Among* Porter County, NRDC v. NRC, Seacoast, *and the Jurisdictional Language in 42 U.S.C. § 2239*

Upon reflection, we are no longer comfortable with the strain our decisions have placed on the clear-cut language of 42 U.S.C. § 2239. By applying to section 2.206 requests the "necessary first step" rationale employed by this court in *NRDC v. NRC*, the Seventh Circuit in *Rockford* and this court in *Seacoast* have interpreted "proceeding" in section 2239(b) as encompassing the informal process commenced by the filing of a section 2.206 request. *See Rockford*, 679 F.2d at 1221. Yet, the statutory language of 42 U.S.C. § 2239(b) explicitly restricts our reviewing jurisdiction to those final orders entered in the kinds of formal "proceedings" specified in 42 U.S.C. § 2239(a). This unusual, interlocking scheme does not allow "proceeding" to mean one thing for procedural purposes and another for jurisdictional purposes. Accordingly, we cannot rely on our constructions of other statutory schemes—usually requiring interpretation of a simple, jurisdictional grant to review agency "orders"—in which Congress impliedly may have intended broader meanings to attend the same words in jurisdictional sections than in other sections. *See, e.g., Investment Company Institute v. Board of Governors of the Federal Reserve System*, 551 F.2d 1270, 1276-81 (D.C. Cir. 1977) (construing the word "order" more broadly in jurisdictional section than in other, non-related sections of the Bank Holding Act of 1956); *cf. City of Rochester v. Bond*, 603 F.2d 927, 933 n. 26 (D.C. Cir. 1979) (courts sometimes construe "order" for purposes of special review provisions more expansively than its definition in the Administrative Procedure Act). Nor may we read out the unusual cross-reference in 42 U.S.C. § 2239 by relying on cases generally confirming the institutional ability of this court to review informal agency action. *See, e.g., Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1098-99 (D.C. Cir. 1970). Our inferences of Congress' jurisdictional choices operate only "in those cases not plainly governed by statutory language or history." *City of Rochester v. Bond*, 603 F.2d at 935. In the present case, we are confronted with a peculiar jurisdictional statute which precludes us from interpreting "proceedings" in 42 U.S.C. § 2239(b) with the same latitude with which we have legitimately interpreted such terms as "orders" or "final orders" in other statutes. Here, Congress has explicitly referenced its use of the word "proceeding" in the statute's jurisdictional section

to the kinds of "proceedings" specified in the statute's procedural section. Thus, we are presented with one of those unusual statutes "which define a reviewable order with such limiting circumstantiality that a number of determinative agency actions cannot possibly be squared with the requirements." L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 422 (Abridged Student Ed. 1965).

Given this unusually self-contained statutory scheme, there is no room in which to import the well-founded presumption against bifurcation of judicial forums. However economical we may find exclusive court of appeals review of the NRC's section 2.206 decisions to be, it is one thing to read notions of judicial economy into statutory terms capable of assimilating them and quite another to read out Congress' jurisdictional terms in order to accommodate our own policy preferences. To paraphrase an opinion by Judge Posner issued shortly after his opinion in *Rockford*, the precise statutory provision by which Congress has granted exclusive jurisdiction to courts of appeals "is not some mindless, irksome technicality that we should try to construe our way around." *Denberg v. Railroad Retirement Board*, 696 F.2d 1193, 1196 (7th Cir. 1983). The conclusion of this court in *Porter County* that section 2.206 requests do not entail "proceedings" under 42 U.S.C. § 2239(a) for procedural purposes, 606 F.2d at 1369, and the Commission's reiteration in the present case that "[u]nless and until granted, a [request for enforcement] is not a 'proceeding' where the requester has any right to present evidence," Government Brief at 24-25, precludes this court from viewing the section 2.206 process as a "necessary" part of the NRC's formal licensing proceedings for jurisdictional purposes. *Cf. Foti v. Immigration and Naturalization Service*, 375 U.S. 217, 232, 84 S.Ct. 306, 315, 11 L.Ed.2d 281 (1965) (in light of compelling legislative history, court of appeals jurisdiction over "final orders of deportation" included jurisdiction over administrative



determination historically and consistently made as an integral part of the formal deportation hearings). There is no evidence in the sparse legislative history surrounding the passage of 42 U.S.C. § 2239 to suggest that Congress envisioned its jurisdictional grant in section 2239(b) to extend beyond orders entered in formal hearings. *Compare* 42 U.S.C. § 2239(b) (1976) (final version of § 189 of the Atomic Energy Act of 1954) *with* H.R. 8862, 83d Cong., 2d Sess. § 189 (1954), *reprinted in* I *Legislative History of the Atomic Energy Act of 1954* (*Legislative History*) at 105, 167-68 (1955) (unenacted version of § 189, as introduced, providing for review in the courts of appeals of "any proceeding to enjoin, set aside, annul, or suspend any order of the Commission") *and* H.R. 9757, 83d Cong., 2d Sess. § 189 (1954) (unenacted version of § 189, as introduced, providing for review in the courts of appeals of "[a]ny final order granting, denying, suspending, revoking, modifying, or rescinding any license."). *See generally* H.R.Rep. No. 2181, 83d Cong., 2d Sess. (1954); S.Rep. No. 1699, 83d Cong., 2d Sess., *reprinted in* [1954] U.S. Code Cong. & Admin. News 3456; 100 Cong. Rec. 10685-86 (1954).

Thus, in light of the specific jurisdictional grant given to us by Congress in 42 U.S.C. § 2239(b), we can no longer reconcile the "necessary first step" rationale of *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission*, 606 F.2d 1261 (D.C. Cir. 1979) and *Seacoast Anti-Pollution League of New Hampshire v. Nuclear Regulatory Commission*, 690 F.2d 1025 (D.C. Cir. 1982) with our holding in *Porter County Chapter of the Izaak Walton League v. Nuclear Regulatory Commission*, 606 F.2d 1363 (D.C. Cir. 1979) and the Commission's steadfast insistence that the section 2.206 process does not entail a "proceeding" within the meaning of 42 U.S.C. § 2239(a). Accordingly, we hold that this court is without subject matter jurisdiction to review directly the Commission's section 2.206 decisions under

42 U.S.C. § 2239(b).** To avoid misunderstanding, however, we emphasize that we are not holding today that the NRC's denials of section 2.206 requests are unreviewable. A requester allegedly injured by the NRC's refusal to institute licensing proceedings is presumptively entitled to judicial review for agency action asserted to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. In the absence of any applicable statute prescribing review in a particular court—which is the case here regarding the NRC's denials of section 2.206 requests—"nonstatutory" review may be sought in district court under any applicable jurisdictional grant, *see City of Rochester v. Bond*, 603 F.2d at 931. As Judge Posner indicated in *Rockford*, district court review of the NRC's section 2.206 decisions could be predicated on the general federal question jurisdictional statute, 28 U.S.C. § 1331 (Supp. V 1981) and, possibly, under the jurisdictional grant regarding acts of commerce, 28 U.S.C. § 1337 (1976), as well. This court, of course, would then be able to review the decisions of the district court under 28 U.S.C. § 1291 (1976).

It may well be that Congress will want to amend its jurisdictional grant in 42 U.S.C. § 2239(b) to allow courts of appeals to review directly the NRC's denials of section 2.206 requests. Or Congress may want to leave

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** Because this holding resolves an unavoidable conflict among these prior decisions, this part of our opinion has been separately considered and approved by the full court, and thus constitutes the law of the circuit. We wish to make clear, however, that our change of course today does not upset the *res judicata* effect of our prior decisions, on the merits, on the parties in *NRDC v. NRC*, *Porter County*, or *Seacoast*. *Cf. Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940) (*res judicata* applied to prior decisions of lower court under jurisdictional statute subsequently declared unconstitutional); Restatement (Second) of Judgments § 12 (1982) (interests in finality can operate to give *res judicata* effect to decisions resting on incorrect subject matter jurisdiction determinations).



jurisdiction over such informal decisions in district courts. Our opinion today merely holds that the statutory limitations on our present jurisdiction in 42 U.S.C. § 2239(b) make it a decision for Congress, and not for this court, to make. The present case is therefore dismissed from this court for lack of subject matter jurisdiction and transferred to the federal District Court for the District of Columbia pursuant to 28 U.S.C.A. § 1631 (West 1983).

*It is so ordered.*

B. Director's Decision

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14 NRC 1078 (1981)

DD-81-21

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

OFFICE OF NUCLEAR REACTOR REGULATION

Harold R. Denton, Director

Docket No. 50-251 (10 CFR 2.206)

In the Matter of

FLORIDA POWER AND LIGHT COMPANY
(Turkey Point Plant, Unit 4)

November 5, 1981

The Director of the Office of Nuclear Reactor Regulation denies a petition under 10 CFR 2.206 which requested the Commission (1) to order an immediate shutdown of Turkey Point Plant, Unit 4, to inspect the steam generator tubes, and (2) to consider the suspension of the operating license of Turkey Point Plant, Unit 4, because of concerns over the safety of the reactor pressure vessel.

## DIRECTOR'S DECISION UNDER 10 CFR 2.206

By a letter dated September 11, 1981, signed by Joette Lorion, the Center for Nuclear Responsibility (Center), which is located in South Miami, Florida, petitioned the Nuclear Regulatory Commission to take the following actions in relation to Turkey Point Plant, Unit 4 (Unit 4):

1) Immediately order a shutdown to inspect the steam generator tubes; and



2) Consider the suspension of the plant's operating license because of concerns over the safety of the reactor pressure vessel.

The petition was referred by the Commission to the Director, Office of Nuclear Reactor Regulation, for action in accordance with 10 CFR 2.206 of the Commission's regulations.

### I. Requested Shutdown for Steam Generator Inspection

In summary, the background of the steam generator problem is as follows:

> In the mid-1970's, a number of nuclear power plants, including Turkey Point Plant Unit Nos. 3 and 4, began to have problems with leaking steam generator tubes due to a corrosive process called "denting." On October 29, 1976, the NRC staff set forth minimum requirements to ensure that Units 3 and 4 would not, as a result of this denting phenomenon, operate with reduced integrity of the primary system pressure boundary. Since that time the plants have operated under strict requirements imposed by the NRC staff.[1]

Under the terms of these requirements, Florida Power and Light Company (FPL) has received permission for short-term extensions of operation for Unit Nos. 3 and 4 in the form of license amendments. Following shutdown, inspection and plugging of tubes that were judged by the licensee to be in danger of leaking in the ensuing 10 months, and NRC staff analysis of the inspection and plugging, license amendments were granted to allow six months of full power equivalent operation. Subject to operating experience which indicated that further operation before shutdown and inspection would not endanger public health and safety, additional extensions have also

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[1] Florida Power and Light Company (Turkey Point Plant, Unit 3), DD-80-28, 12 NRC 386, 388 (1980).

been granted, for totals of up to 10 months of full power equivalent operation between inspections.

FPL reported on the last previous inspection of Unit 4, which they performed in November, 1980, in a letter to the Commission dated December 18, 1980. The letter also contained a request for continued operation of Unit 4. After reviewing the inspection results, NRC issued Amendment 54 to License No. DPR-41 on January 15, 1981. Amendment 54 allowed continued operation for six equivalent full power months, commencing January 13, 1981. Operation beyond the six-month period without further inspection was also anticipated and permitted in Amendment 54, but subject to the requirement that "an acceptable analysis of the susceptibility for stress corrosion cracking of tubing is submitted to explicitly justify continued operation of Unit 4 beyond the authorized period of operation."[2]

In response to a FPL request dated May 27, 1981 for a four-month extension of operating permission, the NRC staff again reviewed the status of the steam generators in Unit 4. Based upon this re-review, an extension for two equivalent full power months was granted in Amendment 62, dated July 6, 1981.

On July 30, 1981, FPL requested an additional two months operation for Unit 4. Again the NRC staff reviewed the status of the steam generators and based upon this re-review, an additional extension of two equivalent full power months was granted in Amendment 66, dated September 10, 1981. Amendment 66 allowed operation for ten equivalent full power months from January 13, 1981.

An important factor underlying the decision to grant the extensions authorized by Amendment 62 and 66 has

[2] Facility Operating License No. DPR-41, as amended by Amendment 54, paragraph D(1).



been the continued essentially leak-free operation of the steam generators throughout the period in question.

Most recently, on October 19, 1981, FPL has shut down Unit 4 and commenced an inspection of the steam generators. Thus, the request in the petition for a shutdown to inspect the steam generators is now moot.

## II. Petitioner's Allegations Concerning Steam Generator Safety

The Center in its petition makes a number of allegations concerning the safety of the steam generators in Unit No. 4.

The first is that Unit 4 is operating with "nearly 25 percent of its steam generator tubes plugged and removed from service. This reduction in heat transfer area could cause this unit to be more susceptible to overheating, necessitating emergency cooling." The Center also states that the steam generator tubes will continue to deteriorate.

FPL sought by application dated April 29, 1980, to operate Unit 4 with 25 percent of steam generator tubes plugged. The staff concluded that operation of Turkey Point Unit No. 4 with up to 25 percent of the tubes plugged is acceptable[3] and issued Amendment 50 to the license, dated May 15, 1980, which permitted operation with 25 percent of the tubes plugged. A total of 23.8 percent of the tubes were plugged prior to Amendment 54 and the recently concluded period of operation.[4]

[3] Safety Evaluation by the Office of Nuclear Reactor Regulation Related to Amendments 57 and 50 to Facility Operating Licenses Nos. DPR-31 and DPR-41. (May 15, 1980).

[4] Safety Evaluation by the Office of Nuclear Reactor Regulation Related to Amendment No. 54 to Facility Operating License No. DPR-41, page 4 (January 15, 1981).

Subsequent safety analysis by the staff of FPL's application for Amendment dated March 5, 1981, showed that operation with 28 percent of the tubes plugged is acceptable. Operation with this level of tube plugging was permitted in Amendment 60, dated June 23, 1981.

The safety analysis supporting Amendment 60 does not imply that plugging of more than 28 percent of the tubes would be unsafe; the analysis was performed at the 28 percent level because it is expected that the 28 percent limit will be fully sufficient to allow plugging of all tubes which the current inspection of Unit 4 will show might be susceptible to leaking in the foreseeable future.[5] The plugging is, and has been, carried out by the licensee as a prophylactic program, and it has been successful in preventing leakage since mid-1978.[6]

The Center in its letter quotes the NRC to the effect that, "We do not have an adequate technical basis to predict steam generator performance for periods longer than six months." While the author of the letter does not identify the source of the quotation, a virtually identical statement was made in NRC, *Safety Evaluation by the Office of Nuclear Reactor Regulation Related to Amendment No. 52 to Facility Operating License No. DPR-31.*[7] The latter statement, however, continues, ". . . and that our consideration of extended operation beyond six (6)

[5] Safety Evaluation by the Office of Nuclear Reactor Regulation Relating to Amendment No. 68 to Facility Operating License No. DPR-31 and Amendment No. 60 to Facility Operating License No. DPR-41 (June 23, 1981). It is expected that approximately 2 percent additional plugging will be required in Unit 4 beyond the current 23.8 percent.

[6] Safety Evaluation by the Office of Nuclear Reactor Regulation Relating to Amendment No. 66 to Facility Operating License No. DPR-41 (September 10, 1981).

[7] Unit 3 has the same design steam generator as Unit 4 with substantially similar degradation experience.



months would depend upon the operating experience at this and similarly degraded units." This last quotation reflects the consistent policy of the Commission in relation to Turkey Point Units Nos. 3 and 4. Thus statements concerning six-month maximum prediction period, such as the one quoted by the Center, must be taken in context. In context, it is clear the six-month initial period of operation after an inspection of steam generators may be followed by extensions, provided the technical basis supplied by the licensee, and the relevant operating experience, justify the extensions. This course of action has been followed in relation to Turkey Point Units No. 3 and 4 since 1977[8] and satisfactorily protects the public health and safety.

The Center further asserts that the "steam generator tubes [of Unit 4] may be on the verge of leaking"; and that, according to a 1975 study by the Union of Concerned Scientists (study not further identified in the Center's letter), rupture of "a handful of tubes" would result in a core melt, with very serious public safety results.

The Staff, based on its studies, does not anticipate that a "handful of tubes" will rupture ("handful" is undefined in the petition), or that such an event, if it should occur, would cause a core melt. Neither does the petitioner advance any factual basis for anticipating such events. Isolated breaks of single tubes which could be described by the word "rupture" have occurred in steam generators similar to those of Unit 4. In these instances, however, the reactors have been shut down in an orderly fashion.

As indicated above, the steam generator tubes of Unit 4 are being regularly monitored. Moreover, the license for Unit 4 requires a cold shutdown if leakage exceeds

[8] Florida Power and Light Company (Turkey Point Plant, Unit 3), DD-80-28, 12 NRC 386 (1980).

the prescribed limit of 0.3 gpm per steam generator.[9] Staff is of the view that the 0.3 gpm leakage limit, and actions required should this rate be exceeded (along with the monitoring previously described), are fully adequate to protect the health and safety of the public.[10]

Finally, the Center asserts in its letter that steam generator tube integrity is an unresolved safety issue. While it is true that the problem of steam generator tube integrity is not fully resolved, the problem has received careful ongoing review and analysis, as described above. Accordingly, and in view of the history of the steam generators of Unit 4, further action by NRC regarding Unit 4's steam generators is unnecessary at this time. The procedures and safeguards instituted in relation to that problem are sufficient to safeguard the public health and safety.[11]

## III. Requested Action With Reference to Reactor Pressure Vessel

The Center asserts that Turkey Point Unit No. 4 is one of a number of nuclear power plants "whose steel pressure vessel may be vulnerable to cracking or shattering caused by thermal shock in the event of an accident that requires high pressure injection emergency cooling." The petition further cites pressure vessel safety as an unresolved safety issue.

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[9] Facility Operating License No. DPR-41, as amended, paragraph D(2).

[10] Safety Evaluations, footnotes 3 and 5, *supra*.

[11] NRC Regulatory Guide 1.83 contains the standard procedures for inspecting steam generators, which standards are considered adequate by NRC for protecting the public health and safety. The procedures which have been developed for Turkey Point and inserted in Unit 4's operating license as mandatory requirements are significantly more rigorous than the procedures in Regulatory Guide 1.83, and therefore provide an additional margin of safety.



During the past few months the subject of reactor pressure vessel thermal shock has received increased attention by the NRC staff and industry representatives. The NRC staff has recently evaluated (1) the types of transients or accidents that could lead to overcooling of the reactor system; (2) experience to date with transients that have occurred in U.S. pressurized water reactors; (3) the probability that such overcooling events will occur; and (4) the capability of reactor vessels to withstand these transients.

As a result of its evaluations to date, the staff has concluded that the probability of a severe overcooling transient is relatively low. For Babcock & Wilcox designed reactors this probability is estimated to be about $10^{-3}$ per reactor per year, and for Westinghouse and Combustion Engineering designed reactors, it is lower, perhaps by an order of magnitude. The staff has also concluded that, based on present irradiation levels at operating reactors, reactor vessel failure from such an event in the near term is unlikely. Therefore, no immediate licensing action is required for operating reactors including Unit 4.[12]

However, the staff believes that additional action should be taken to resolve the long-term problem. Toward this end, the staff, the Pressurized Water Reactor (PWR) owners' group, and PWR vendors are working together to determine the scope of the generic pressure vessel problem. In addition, plants with the most limiting condition (in terms of assured period of continued safe operation) in each vendor's group have been selected for individual study. Unit 4 having been selected as one of the plants for plant-specific study, a letter dated August 21, 1981, was sent to require the licensee in accordance with 10 CFR 50.54(f) of the Commission's regulations to

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[12] *Preliminary Assessment of Thermal Shock to PWR Reactor Pressure Vessels*, SECY 81-286 (May 4, 1981).

submit information for review. Based upon the generic and plant-specific studies and reviews, NRC will take timely action in relation to the reactor vessel problem.

IV. Request for "License Review"

The letter from the Center also asked:

> that the Nuclear Regulatory Commission take steps to immediately initiate a license review of this nuclear reactor unit [Unit 4]. It is the responsibility of the Nuclear Regulatory Commission to protect the public health and safety, and this can only be accomplished if adequate safety systems exist to protect the public in case of an accident . . . . We hope at this point the NRC will derate the unit, so that it doesn't operate in an unsafe manner.

Requests for a "license review" and to "derate the unit" appear to be synonymous with the request that the NRC consider the suspension of the license of Unit 4. Other than the assertions which have been discussed above concerning the steam generators and reactor vessel, the petitioner advances no facts that relate to possible safety inadequacies.

V. Conclusion

Based on the foregoing discussion, I have determined that the petitioner's request for an order to shut down the Turkey Point Plant Unit 4 to inspect steam generator tubes should be and is hereby denied. Further, based upon the staff analyses of the Reactor Vessel question, I have also concluded that the petitioner's request for consideration of suspension of the license of Turkey Point Unit No. 4 should also be denied.

A copy of this decision will be placed in the Commission's Public Document Room at 1717 H Street, N.W., Washington, D.C. 20555 and the local public document



room for the Turkey Point Plant located at the Environmental Urban Affairs Library, Florida International University, Miami, Florida 33199. A copy of this decision will also be filed with the Office of the Secretary of the Commission for its review in accordance with 10 CFR 2.206(c) of the Commission's regulations.

FOR THE NUCLEAR
REGULATORY COMMISSION

Harold R. Denton, Director
Office of Nuclear Reactor Regulation

Dated at Bethesda, Maryland
this 5th day of November, 1981.

## II. Statutes and Regulations

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28 U.S.C. § 2342(4) (1976)

§ 2342. Jurisdiction of court of appeals

The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

• • • •

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42; and

• • • •

42 U.S.C. § 2239 (1976 & West Supp. 1983)

§ 2239. Hearings and judicial review

(a)(1) In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, and in any proceeding for the payment of compensation, an award or royalties under sections 2183, 2187, 2236(c) or 2238 of this title, the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding. The Commission shall hold a hearing after thirty days' notice and publication once in the Federal Register, on each application under section 2133 or 2134(b) of this title for a construction permit for a facility, and on any application under section 2134(c) of this title for a construction permit for a testing facility. In cases where such a construction permit has been issued following the holding of such a hearing, the Commission may, in the



absence of a request therefor by any person whose interest may be affected, issue an operating license or an amendment to a construction permit or an amendment to an operating license without a hearing, but upon thirty days' notice and publication once in the Federal Register of its intent to do so. The Commission may dispense with such thirty days' notice and publication with respect to any application for an amendment to a construction permit or an amendment to an operating license upon a determination by the Commission that the amendment involves no significant hazards consideration.

(2)(A) The Commission may issue and make immediately effective any amendment to an operating license, upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person. Such amendment may be issued and made immediately effective in advance of the holding and completion of any required hearing. In determining under this section whether such amendment involves no significant hazards consideration, the Commission shall consult with the State in which the facility involved is located. In all other respects such amendment shall meet the requirements of this chapter.

(B) The Commission shall periodically (but not less frequently than once every thirty days) publish notice of any amendments issued, or proposed to be issued, as provided in subparagraph (A). Each such notice shall include all amendments issued, or proposed to be issued, since the date of publication of the last such periodic notice. Such notice shall, with respect to each amendment or proposed amendment (i) identify the facility involved; and (ii) provide a brief description of such amendment. Nothing in this subsection shall be construed to delay the effective date of any amendment.

(C) The Commission shall, during the ninety-day period following the effective date of this paragraph, promulgate regulations establishing (i) standards for determining whether any amendment to an operating license involves no significant hazards consideration; (ii) criteria for providing or, in emergency situations, dispensing with prior notice and reasonable opportunity for public comment on any such determination, which criteria shall take into account the exigency of the need for the amendment involved; and (iii) procedures for consultation on any such determination with the State in which the facility involved is located.

• • • •

(b) Any final order entered in any proceeding of the kind specified in subsection (a) of this section shall be subject to judicial review in the manner prescribed in the Act of December 29, 1950, as amended, and to the provisions of section 10 of the Administrative Procedure Act, as amended.

10 C.F.R. § 2.202 (1983)

§ 2.202 Order to show cause.

(a) The Executive Director for Operations during an emergency as determined by the EDO, and Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, and Director, Office of Administration, as appropriate may institute a proceeding to modify, suspend, or revoke a license or for such other action as may be proper by serving on the licensee an order to show cause which will:

(1) Allege the violations with which the licensee is charged, or the potentially hazardous conditions or other facts deemed to be sufficient ground for the proposed action;



(2) Provide that the licensee may file a written answer to the order under oath or affirmation within twenty (20) days of its date, or such other time as may be specified in the order;

(3) Inform the licensee of his right, within twenty (20) days of that date of the order, or such other time as may be specified in the order, to demand a hearing;

(4) Specify the issues; and

(5) State the effective date of the order.

(b) A licensee may respond to an order to show cause by filing a written answer under oath or affirmation. The answer shall specifically admit or deny each allegation or charge made in the order to show cause, and may set forth the matters of fact and law on which the licensee relies. The answer may demand a hearing.

(c) If the answer demands a hearing, the Commission will issue an order designating the time and place of hearing.

(d) An answer or stipulation may consent to the entry of an order in substantially the form proposed in the order to show cause.

(e) The consent of the licensee to the entry of an order shall constitute a waiver by the licensee of a hearing, findings of fact and conclusions of law, and of all right to seek Commission and judicial review or to contest the validity of the order in any forum. The order shall have the same force and effect as an order made after hearing by a presiding officer or the Commission.

(f) When the Executive Director for Operations, during an emergency as determined by the EDO, or the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, as appropriate, finds that the public health, safety, or interest so requires or that

the violation is willful, the order to show cause may provide, for stated reasons, that the proposed action be temporarily effective pending further order.

10 C.F.R. § 2.206 (1983)

§ 2.206 Requests for action under this subpart.

(a) Any person may file a request for the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, as appropriate, to institute a proceeding pursuant to § 2.202 to modify, suspend or revoke a license, or for such other action as may be proper. Such a request shall be addressed to the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, as appropriate, and shall be filed either: (1) By delivery to the Public Document Room at 1717 H Street N.W., Washington, D.C., or (2) by mail or telegram addressed to the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, as appropriate, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555. The requests shall specify the action requested and set forth the facts that constitute the basis for the request.

(b) Within a reasonable time after a request pursuant to paragraph (a) of this section has been received, the Director of Nuclear Reactor Regulation, Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and Enforcement, as appropriate shall either institute the requested proceeding in accordance with this subpart or shall advise the person who made the request in writing that no proceeding will be instituted in whole or in part, with respect to his request, and the reasons therefor.



(c) (1) Director's decisions under this section will be filed with the Office of the Secretary. Within twenty-five (25) days after the date of the Director's decision under this section that no proceeding will be instituted or other action taken in whole or in part, the Commission may on its own motion review that decision, in whole or in part, to determine if the Director has abused his discretion. This review power does not limit in any way either the Commission's supervisory power over delegated staff actions or the Commission's power to consult with the staff on a formal or informal basis regarding institution of proceedings under this section.

(2) No petition or other request for Commission review of a Director's decision under this section will be entertained by the Commission.

# RESPONDENT'S

# BRIEF

# In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-703

FLORIDA POWER & LIGHT COMPANY,
*Petitioner,*

v.

JOETTE LORION, d/b/a
CENTER FOR NUCLEAR RESPONSIBILITY,
*Respondent,*

UNITED STATES NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA,
*Respondents.*

and No. 83-1031

UNITED STATES NUCLEAR REGULATORY COMMISSION
AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

JOETTE LORION, ET AL.

*ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## REPLY

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## QUESTION PRESENTED

Whether the court of appeals had jurisdiction, under 28 U.S.C. (Supp. V) 2342(4) and 42 U.S.C. 2239(b), to review a Nuclear Regulatory Commission order denying respondent's request that it suspend a nuclear power plant's operating license.

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**REPLY**



RESPONDENT'S REPLY

Upon careful and deliberate consideration of the issue, Respondent, Joette Lorion et al., has determined that she will not submit argument in opposition to the captioned petitions for writs of certiorari which address a decision of the United States Court of Appeals for the District of Columbia Circuit reported at 712 F. 2d 1472 (DC Cir. 1983).

While Joette Lorion supports the decision of the Court of Appeals, she concedes that the decision in this case conflicts with decisions in the Second and Seventh Circuits (See Government Pet. at page 7; also FPL Pet. at page 7). Respondent also concedes that these conflicts pose issues of sufficient importance that they will ultimately require resolution by the Supreme Court of the United States.

Whether the Court should accept this case or defer review until the District Court in this case (or in other cases) has been permitted to develop a full record, is a matter we would leave to the Court's prudential discretion.

Should the Court determine the issues are presently ripe and warrant review, we will, of course, appear and file substantive briefs in support of the Court of Appeals decision.

Respectfully submitted,

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